

BEFORE THE COMMISSIONER OF INSURANCE  
OF THE STATE OF WASHINGTON

In the Matter of

No. G02-45

THE APPLICATION REGARDING  
THE CONVERSION AND  
ACQUISITION OF CONTROL OF  
PREMERA BLUE CROSS AND ITS  
AFFILIATES

SECOND JOINT STATUS REPORT  
OF OIC STAFF AND PREMERA  
BLUE CROSS AND ITS AFFILIATES

In compliance with the instructions contained in the Fifth Order: Setting Status Conference; Addressing Certain Discovery Matters; and Revising Filing Requirements issued by the Commissioner on March 14, 2003, the OIC Staff and Premera Blue Cross and its Affiliates ("Premera") hereby submit their Second Joint Status Report.

**INTRODUCTION**

The parties have continued to take steps to expedite the information-gathering process. Beginning on Thursday, March 6, 2003, representatives of Premera, the OIC Staff, the Alaska Division of Insurance ("ADI"), and the consultants retained by the OIC Staff and ADI ("States' Consultants"), have participated in teleconferences conducted twice a week on Tuesdays and Thursdays, except for March 13, for the purpose of facilitating communications between the parties, identifying requested information that has not been produced, clarifying requests and responses, discussing dates for data production and feedback from the States' Consultants, and making new requests for information. As promised in the First Joint Status Report, representatives of Premera, the OIC Staff, the States' Consultants, and the ADI also met on March 14, 2003, to enhance the process initiated through the teleconferences. Substantial progress has been made, but the OIC Staff and the States' Consultants contend

1 that a number of responses to requests for information are not complete and that Premera is  
2 withholding some information that it claims is privileged or subject to third party  
3 confidentiality. On the other hand, Premera contends that it has produced all non-privileged  
4 documents that are responsive to the requests received from the States' Consultants, apart  
5 from information that is the subject of recent requests (the States' Consultants having  
6 submitted 44 new data requests since the March 3 status conference), the completion of  
7 interviews and explanations relating to recently identified tax issues and newly revised  
8 financial projections, and one document as to which third-party confidentiality concerns are  
9 still being addressed (E 403).

10 Premera completed a detailed privilege log that was furnished to the OIC Staff on  
11 March 14. After close of business on March 19, Premera submitted a revised privilege log  
12 that included four items inadvertently omitted from the earlier log. The log identified 111  
13 items that Premera is withholding under a claim of attorney-client privilege, work product, or  
14 both. The log did not, however, cross-reference items identified in the log with the requests  
15 for information listed on the data production matrix to which the privileged materials were  
16 responsive. The OIC Staff contends that this precluded evaluation of the log by the OIC Staff  
17 and the States' Consultants. Upon request, Premera submitted a revised log on March 20 that  
18 cross-referenced the items in the log with the relevant data requests. The OIC Staff and the  
19 States' Consultants have initiated a review of the revised log to determine the materiality of  
20 withheld documents and consider the validity of Premera's claims of privilege. The parties  
21 anticipate meeting to discuss these matters as soon as practicable after the review is  
22 concluded.

23 The OIC Staff contends that Premera's position regarding these items may impede the  
24 review of information material to the proposed transaction in a timely fashion and that the  
25 data production phase of this process cannot be considered substantially complete until all  
26

1 issues relating to Premera's claims of privilege are resolved.<sup>1</sup> Premera contends that it is  
2 entitled to protect privileged communications and work product and that the States'  
3 Consultants, who have received vast amounts of information about the proposed transactions,  
4 need not invade Premera's privilege to produce their reports.

### 5 **DATA OR INFORMATION REQUESTS AND RESPONSES**

6 The most recent version of the data production matrix, which summarizes the current  
7 status of the data requests submitted by the States' Consultants, is attached, marked as Exhibit  
8 "A" and incorporated herein by reference.<sup>2</sup> Exhibit "B" is a shorter version of Exhibit "A"  
9 that includes only those items that the OIC Staff and the States' Consultants contend are  
10 incomplete. Exhibit "B" is incorporated herein by reference.

11 In the Fifth Order, the Commissioner requested that Premera address two issues in this  
12 report and that the OIC Staff address one issue.

#### 13 **A. Premera: Reasons that documents have not been produced.**

14 Apart from privileged documents, discussed in the next section, the reasons for open  
15 requests (i.e., those awaiting responsive materials from Premera) are as follows:

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17 <sup>1</sup> The OIC Staff notes that in other Blue Cross Blue Shield transactions, the converting companies agreed  
18 to waive privilege in order to facilitate review by the regulators of the transactions. For example, in Maryland, the  
19 converting company never asserted attorney-client privilege, and thus, did not withhold any information for any  
20 issue on those or similar grounds. The OIC Staff believes that a similar waiver of privilege here would likely  
21 shorten the time frame for the States' Consultants review of the proposed transaction. Premera has been advised  
22 that neither the acquiring entity in Maryland (Wellpoint) nor Blue Cross Blue Shield of North Carolina waived the  
23 attorney-client privilege respect to documents shared with the regulars or their consultants. Blue Cross Blue  
24 Shield of North Carolina instead protected attorney-client privileged documents and maintained a privilege log of  
protected documents. Premera has not been able to confirm the extent of any waiver by Carefirst in Maryland.  
Because waiver is rare and carries with it potentially enormous ramifications, Premera suspects that any waiver  
was narrowly focused on particular issues (e.g., board solicitation of competing bids) that could not be otherwise  
evaluated. Premera contends that the circumstances here are very different, with the States' Consultants having  
been furnished some 33,000 pages of documents. See also Premera's discussion of confidentiality and privilege  
below.

25 <sup>2</sup> The item request numbers are located in the leftmost column entitled "Request No." The requests are  
26 listed consecutively. This exhibit reflects the status of requests submitted by both the OIC Staff consultants and  
the ADI consultants as of March 20, 2003, accompanied by Premera's response or comment. The Consultants'  
comments have not been updated in Exhibit "A" for open items. For such comments, see Exhibit "B."

REQUEST #	
WA 74	Revised Projection Model (incorporating changes discussed at 3/14/2003 meeting with Consultants) will be emailed to Consultants on March 21.
WA 82	Meeting with Jim Grazko (VP of Underwriting) is scheduled for March 24.
B 157	Request re-opened on March 14. Premera will provide responsive documentation by March 28.
B 164	Request re-opened on March 14. Premera will provide responsive documentation by March 28.
C 241	This is related to a new request made by Signal Hill on February 28. Premera will provide responsive documentation to the consultants by March 28.
C 246	Received clarification from Signal Hill on March 20 as to why item was thought incomplete. Premera will provide response to consultants by March 28.
E 403	Premera is working with Microsoft in an attempt to secure its consent to release of contract, which is subject to non-disclosure agreement.
E 445	Received clarification from PWC on March 13 regarding exactly what Consultants need. Premera will provide responsive documentation on March 21.
E 500-502	New requests as of February 26. Premera will provide responsive documentation on March 21.
E505-506	New requests as of February 28. Premera will provide responsive documentation by March 28.
E507-509	New requests as of March 14. Premera will provide responsive documentation by March 28.
E 510	New request as of March 19. Premera will provide responsive documentation by April 4.
847 & 849	Meeting with Jim Grazko (VP of Underwriting) is scheduled for March 24.
871 & 872	New requests received March 5. Premera will provide responsive documentation by March 21.
872-910	New tax-related requests received March 4. Premera will provide responsive documentation by March 28.

Premera is also waiting for the States' Consultants to complete their review of 13 items that, according to the OIC Staff and the States' Consultants, remain "incomplete."

1        **B. Premera: Whether the documents' production is covered or could be covered by a**  
2        **confidentiality agreement between Premera and the OIC Staff and the States'**  
3        **Consultants.**

4        Premera understands the Commissioner to be asking whether a special confidentiality  
5        agreement would permit the disclosure of privileged material to the OIC Staff and the States'  
6        Consultants without waiver of the privilege as to others (e.g., those that are suing Premera in  
7        an effort to frustrate Premera's plans). The answer, unfortunately, appears to be no. There is  
8        considerable disagreement among the courts to have addressed the issue raised by the  
9        Commissioner, but the majority have rejected the proposition that one can selectively waive  
10       attorney-client privilege and work product protection through the mechanism of a  
11       confidentiality agreement.

12       The most recent appellate decision on the topic, Tennessee Laborers Health & Welfare  
13       Fund v. Columbia/HCA Healthcare Corp., 293 F.3d 789 (6<sup>th</sup> Cir. 2002), presents a good  
14       summary of the evolution of judicial thinking. A copy is attached as Attachment 1. In that  
15       case a governmental agency (DOJ) agreed to stringent confidentiality provisions for the  
16       documents obtained from Columbia/HCA. When third parties sought the same documents,  
17       Columbia/HCA argued that it had not waived the privilege and that, in disclosing the  
18       information to the government, it had expressly reserved the right to assert both attorney-client  
19       privilege and work product doctrine. The trial court rejected Columbia/HCA's argument, and  
20       the Sixth Circuit affirmed.

21       The court noted that privilege exists to safeguard communications between attorneys  
22       and their clients, not to protect communications between clients and the government.  
23       Furthermore,

24       any form of selective waiver, even that which stems from a confidentiality  
25       agreement, transforms the attorney-client privilege into "merely another brush  
26       on an attorney's palette, utilized and manipulated to gain tactical or strategic  
     advantage." ... Once "the privacy for the sake of which the privilege was  
     created [is] gone by the [client's] own consent, ... the privilege does not remain  
     in such circumstances for the mere sake of giving the client an additional  
     weapon to use or not at his choice." ... "The client cannot be permitted to pick

1 and choose among his opponents, waiving the privilege for some and  
2 resurrecting the claim of confidentiality as to others, or to invoke the privilege  
3 as to communications whose confidentiality he has already compromised for his  
benefit.” ...

4 293 F.3d at 302-03 (citations omitted). In addition, the court noted, privilege is a matter of  
5 common-law right, “the oldest of the privileges for confidential communications known to the  
6 common law” (id. at 303, quoting Upjohn v. United States, 449 U.S. 383, 389 (1981)), not a  
7 creature of contract. It would certainly be possible to protect the expectations of the parties to  
8 a confidentiality agreement by honoring it, but that “does little to serve the ‘public ends’ of  
9 adequate legal representation that the attorney-client privilege is designed to protect.” Id.

10 The court also rejected Columbia/HCA’s argument that it had preserved the ability to  
11 assert work product protection, ruling that the standard for waiver of work product doctrine  
12 was coextensive with that governing privilege: “once the privilege is waived, waiver is  
13 complete and final.” Id. at 307.

14 To be sure, some courts have approved the concept of selective waiver, at least where  
15 the party disclosing documents has taken special pains to state that it was not waiving privilege  
16 or work product protection. See Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th  
17 Cir. 1978) (en banc) (allowing the preservation of privilege where Diversified voluntarily  
18 disclosed otherwise privileged documents to the SEC); In re Steinhardt Partners, L.P., 9 F.3d  
19 230, 236 (2d Cir. 1993) (rejecting selective waiver theory, but noting that it might be possible  
20 to preserve privilege where “the SEC and the disclosing party have entered into an explicit  
21 agreement that the SEC will maintain the confidentiality of the disclosed materials.”);  
22 Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7<sup>th</sup> Cir. 1997) (rejecting selective waiver  
23 theory, but suggesting that disclosing party might have been more careful by obtaining the  
24 agreement of the party to which material had been disclosed not to spread it further).

25 Most courts, however, have rejected the notion of selective waiver and, with it, efforts  
26 to prevent blanket waiver through confidentiality or similar agreements. See United States v.

1 MIT, 129 F.3d 681, 683 (1st Cir. 1997) (rejecting selective waiver theory; although it might be  
2 possible to preserve the privilege through agreements, most courts have not been willing to do  
3 so, and to do so “has no logical terminus.”); Westinghouse Elec. Corp. v. Republic of the  
4 Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991) (rejecting selective waiver theory; “Under  
5 traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client  
6 privilege even if the third party agrees not to disclose the communications to anyone else.”); In  
7 re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) (defense contractors waived privilege  
8 by disclosing communications to federal officials in effort to settle dispute); Permian Corp. v.  
9 United States, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981) (rejecting selective waiver theory;  
10 “such a doctrine would enable litigants to pick and choose among regulatory agencies . . . [the  
11 privilege] should be available only at the traditional price: a litigant who wishes to assert  
12 confidentiality must maintain genuine confidentiality.”); Genentech, Inc. v. United States Int’l  
13 Trade Comm’n, 122 F.3d 1409 (Fed. Cir. 1997) (rejecting limited or selective waiver theory  
14 when disclosure occurred due to inadequate screening procedures).

15 If the Commissioner would like additional briefing on the interests served by the  
16 attorney-client privilege and work product doctrine, or the extremely deleterious consequences  
17 of losing the privilege and work product protection, Premera would be happy to provide it.

18 The foregoing discussion does not apply to Request E 403, as to which Premera has not  
19 claimed any privilege. In the case of Request E 403, a special confidentiality agreement may  
20 be both appropriate and helpful in securing a limited release of confidential information that is  
21 subject to a nondisclosure agreement, which Premera’s customer wishes to protect.

22 **C. OIC Staff: How the absence of such documents will impair or impede the OIC**  
23 **Staff and the States’ Consultants in conducting a proper review of the transaction.**

24 To facilitate evaluation of Premera’s proposal, the OIC Staff initiated a combined  
25 financial and market conduct examination of Premera. The examination was undertaken  
26 pursuant to the authority granted by RCW 48.31C.070, and in accordance with the applicable

1 provisions of title 48, RCW and title 284, WAC including, RCW 48.44.145(1) and  
2 48.03.010(1).

3 The OIC Staff contends that these statutory provisions do not suggest that the  
4 Commissioner need justify any request for information during an examination so long as the  
5 request is calculated to elicit information relating to the operations or transactions of the  
6 company subject to the examination.

7 The OIC Staff's response to the Commissioner's request is not intended to constitute a  
8 justification for any data request submitted to Premera but is intended to only address the  
9 specific issue raised by the Commissioner in the Fifth Order. In this regard, the OIC Staff  
10 offers Exhibits "C" through "J", which are incorporated herein by reference. The exhibits  
11 briefly describe the anticipated impact of information withheld by Premera on the States'  
12 Consultants' reports.<sup>3</sup>

13 **OIC Staff Consultants:**

14 Exhibit "C" – Cantilo & Bennett, L.L.P. (Legal Services)

15 Exhibit "D" – PricewaterhouseCoopers LLP (Actuarial, Accounting and Tax  
16 Services)

17 Exhibit "E" – The Blackstone Group L.P. (Investment Banking Services)

18 Exhibit "F" -- John R. Ellis, Special Assistant Attorney General (Antitrust  
19 Matters)

20 **ADI Consultants:**

21 Exhibit "G" – Signal Hill Capital Group LLC (Investment Banking Services)

22 Exhibit "H" – Reden & Anders, Ltd. (Actuarial Services)

23 Exhibit "I" – Peterson Consulting (Accounting, Tax and Economic Consulting  
24 Services)

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25 <sup>3</sup> Premera has not seen and therefore has not had an opportunity to review or to respond to these exhibits.  
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**REQUEST E 403**

On December 5, 2002, Premera was requested to produce a copy of its contract for services to Microsoft. This request was designated as “E 403.” The OIC Staff contends that the contract must be produced in accordance with the provisions of law cited above relating to examinations. The OIC Staff contends that all operations of Premera are subject to examination by this agency. RCW 48.44.145(1) (“The commissioner may make an examination of the **operations** of any health care service contractor as often as he deems necessary in order to carry out the purposes of this chapter....”), (2) (“Every health care service contractor shall submit its books and records **relating to its operation** for financial condition and market conduct examinations and in every way facilitate them.”) (emphasis added). Further, all transactions of Premera are subject to examination. RCW 48.03.010(1). Without waiving the OIC Staff’s contention relating to justification by the Commissioner of requests for information during examinations, the OIC Staff submits that Premera’s relationship to Microsoft is an important part of Premera’s growth strategy; its management has specifically referred to the Microsoft contract as an example of the success and a portent of the potential success of Premera’s new Dimensions product. Therefore, the OIC Staff contends that an understanding of Premera’s relationship with Microsoft, one of its largest commercial clients, is important to the States’ Consultants’ due diligence analysis which supports their entire valuation analysis.

Premera has declined to produce this contract for the stated reason that the contract has a non-disclosure clause and Premera needs to obtain Microsoft’s waiver of this clause before it will produce the contract. As of this date, the waiver has not yet been obtained. Premera reports that it is actively coordinating with Microsoft in an effort to disclose the requested information in a fashion that meets the needs of the OIC Staff and the States’ Consultants while protecting Microsoft’s confidentiality concerns.

1       The OIC Staff believes that fourteen days should be sufficient to accomplish this goal.  
2 If the issue is not resolved by April 4, 2003, the OIC Staff will request that the Commissioner  
3 order Premera to promptly produce a complete copy of the contract and any related  
4 documents. Premera reserves any arguments that it may have in opposition to this request and  
5 the OIC Staff reserves the right to respond to any argument.

#### 6                   **INTERVIEWS OF PREMERA PERSONNEL AND ADVISORS**

7       The interviews of management and advisors of Premera by the States' Consultants are  
8 substantially complete. Most of the remaining interviews are scheduled or are to be scheduled  
9 for the week of March 24. It is likely that follow-up meetings will be necessary as a result of  
10 information and questions arising out of additional data that Premera has recently produced or  
11 will produce. Although the interviews are substantially complete, there are two meetings not  
12 yet scheduled that are critical to the States' Consultants review of the proposed transaction.  
13 First, a tax meeting has not been scheduled, as the States' Consultants are awaiting responses  
14 to 36 follow-up requests relating to tax issues that are tentatively to be provided by Premera  
15 on March 28. Second, as discussed above, a meeting with representatives of Premera has not  
16 yet been scheduled concerning the privilege log.

#### 17                   **MISCELLANEOUS**

18       The requested indemnification agreements have been provided, except for two (Signal  
19 Hill and Reden & Anders) that are expected to be finalized next week.  
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1 DATED this 21<sup>st</sup> day of March, 2003.

2 Respectfully submitted,

3 OFFICE OF INSURANCE COMMISSIONER  
4 STATE OF WASHINGTON

5  
6 By: \_\_\_\_\_  
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13 and

14 PRESTON GATES & ELLIS LLP

15  
16 By \_\_\_\_\_  
17 Thomas E. Kelly, Jr., WSBA # 05690  
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19 Robert B. Mitchell, WSBA #10874  
20 Attorneys for PREMERA, Premera Blue Cross,  
21 and their affiliated companies  
22  
23  
24

### 25 CERTIFICATE OF SERVICE

26 Pursuant to WAC 10-08-110(3), I certify under penalty of perjury under the laws of the  
State of Washington that this instrument was served upon all parties of record in this  
proceeding by transmitting a copy thereof by FAX, and, on the same day, depositing a copy  
thereof, properly addressed with charges prepaid, with a commercial parcel delivery company  
to the attorney for each party to the proceeding.

Dated: March 21, 2003  
At Tumwater, Washington

\_\_\_\_\_  
John F. Hamje